

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-2026

To be argued by
MICHAEL B. POLLACK

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

vs.

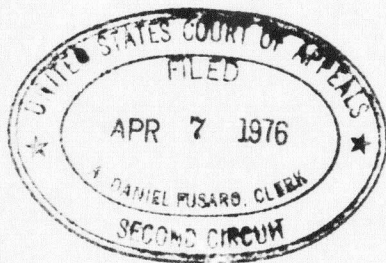
JOHN FRANZESE,

Petitioner-Appellant.

*On Appeal From the United States District Court for the
Eastern District of New York*

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Questions Presented	2
Statutes Involved	2
Statement of Facts	4
Argument:	
Point I. The trial Court erroneously denied appellant's motion for a new trial.	20
A. Was Zaher's trial testimony false? .	23
B. Would Zaher's new testimony be likely to produce a different verdict? .	43
C. Did the appellant exercise due dil- igence in uncovering the Zaher re- cantation?	45
Point II. The District Court should have conducted polygraph examinations in conformity with the guidelines enun- ciated at the hearing.	49
Conclusion	56

ii
Contents

Page

TABLE OF CITATIONS

Cases Cited:

Berry v. Georgia, 10 Ga. 511 (1851)	20
Larrison v. United States, 24 F.2d 82 (7th Cir. 1928)	20, 21
United States v. Betham, 470 F.2d 1367 (9th Cir. 1972)	53
United States v. Costello, 255 F.2d 876 (2nd Cir. 1958)	21
United States v. Dioguardi, 72Cr.1102 . .	53, 54
United States v. Franzese, 321 F. Supp. 993 (E.D.N.Y. 1970)	7, 8, 44
United States v. Franzese, 392 F.2d 954 (2nd Cir. 1969)	11, 25, 26, 38
United States v. Matteo, 64Cr.460 . .	8, 11, 16, 27
United States v. Oliver, 525 F.2d 731 (8th Cir. 1975)	53
United States v. Polisi, 416 F.2d 573 (2nd Cir. 1969)	5, 6, 43

iii
Contents

	Page
United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972)	53
United States v. Stofsky, 527 F.2d 237 (2nd Cir. 1975)	20, 43, 45
United States ex rel. Vincent, 491 Fed. 1326 (2nd Cir. 1974)	20
United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969)	53
United States of America ex rel. Martin Sostre v. Festa, 513 F.2d 1313 (2nd Cir. 1975)	20, 26

Statutes Cited:

18 U.S.C. Section 371	3, 4
18 U.S.C. Section 2113 (a)(c)(d)	2, 4
18 U.S.C. Section 3500	25
18 U.S.C. Section 4208 (a)(2)	1, 6
28 U.S.C. Section 2255	1, 3

Rules Cited:

17 of the Rules of Criminal Procedure . . .	45, 46
---	--------

iv
Contents

	Page
28 of the Rules of Criminal Procedure . . .	54
Fed. R. Evid. 804 (b)(3)	29
<u>Other Authorities Cited:</u>	
American Heritage Dictionary of the Eng- lish Language	28

Preliminary Statement

The Petitioner-Appellant appeals from an Order denying his motion to vacate the judgment of conviction and for a new trial made pursuant to 28 U.S.C. 2255 dated January 21, 1976 filed in the Eastern District of New York by the Honorable Jacob Mishler. The Appellant was indicated on April 12, 1966 and charged with eight counts of various offenses relating to the robbery of Federally insured banks. Upon the trial of the action herein, the Appellant was convicted on counts 2, 4, 7 and 8 of the Indictment. On counts 2 and 4, the Appellant was sentenced to the custody of the Attorney General or his duly authorized representative for a term of twenty-five years on each count, to run consecutively and a fine of \$10,000 on each count. On count 7, Appellant was sentenced to ten years imprisonment to be served concurrently with the sentences imposed under counts 2 and 4. On count 8 (conspiracy) Appellant received a sentence of five years to run consecutively to the term imposed under count 7, but concurrently with the terms imposed under counts 2 and 4. On each count, the Appellant was sentenced pursuant to Title 18, United States Code, Section 4208(a)(2).

Questions Presented

1. Did the trial court deny appellant's motion based upon findings of fact which are wholly unsupported by the evidence?
2. Should the trial court have ordered the polygraph examination of all persons concerned with the trial?

Statutes Involved

Title 18, United States Code, Section 2113 (a), (c) and (d)

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

"(c) Whoever receives, possesses, conceals, stores, barter, sells, or disposes of, any property or money or any other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker."

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more \$10,000 or imprisoned not more than twenty-five years, or both."

Title 18, United States Code, Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Title 28, United States Code, Section 2255 states in part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

Statement of Facts

On September 27, 1965 an FBI agent swore out an affidavit stating probable cause for the arrest of James Smith a/k/a Jimmy Ryan, Eleanor Cordero and John Cordero, charging them with violation of 18 U.S.C. 2113(c) and (d), 371 and 2. On September 30, 1965, the aforementioned three parties and Richard Parks were arrested by agents of the FBI. The record does not indicate any affidavit being filed in support of the arrest of Richard Parks. On October 8, 1965 an indictment was returned charging Smith, John Cordero and Parks along with Anne Massineo, Anthony Polisi, Salvatore Polisi and Charles E. Zaher, Jr. for their part in seven bank robberies committed between July 7 and September 15, 1965. Thus begins one of the most debated and controversial cases to be brought in the Eastern District of New York in many years.

On January 10, 1966, Smith, Cordero, Parks and Zaher withdrew their previously entered plea of not guilty and pleaded guilty to one count of the indictment, and the trial of Anthony and Salvatore Polisi commenced. Parks, Smith and Zaher testified against the father and son. John Cordero, the only one of the four who testified in the Grand Jury, did not testify,

and Eleanor Cordero did not testify and in fact was never indicted. Both Anthony and Salvatore Polisi were found guilty of the charges against them.

During their trial Anthony Polisi was depicted by the witnesses as the mastermind of the bank robberies and Salvatore Polisi was depicted as a party involved in stealing cars, planning bank robberies and actually participating in the bank robberies. Subsequent to the Polisi trial, Parks, Smith and Zaher, joined by John Cordero, told the United States Attorney, and later a federal grand jury, that in fact Anthony Polisi played a minor role in the bank robberies subsequent to July 13, 1965, that the actual mastermind was John Franzese, and that the failure to name Franzese in their initial statements to law enforcement officials was caused by their fear of John Franzese. This story, as it relates to the Polisi role in the robberies, was the same as that told by Cordero in October, 1965, United States v. Polisi, 416 F2d 573 (2nd Cir. 1969). It must be stated with no uncertainty, however, that John Cordero did not implicate John Franzese at any time prior to the trial of Anthony and Salvatore Polisi. See Polisi, supra, and 475A-493A. John Franzese was first implicated by the four witnesses in March, 1966 and John Franzese was indicted on

April 12, 1966 (7A).

In January, 1967 appellant and four co-defendants went on trial in Albany, New York, charged with robbing banks in four states. The trial lasted until March 3, 1967.

The government's entire case against John Franzese rested entirely on the testimony of the four confessed participants. Polisi, supra, at 575. Each of the four witnesses testified at length, the trial transcript was 4400 pages, and during appellant's trial each justified his failure to initially implicate appellant as the leader of the bank robbery ring because of fear. Each witness was confronted by his original failure to name the co-defendants, and on re-direct examination was permitted to explain his failure and the basis of his fear, which was totally from hearsay and jailhouse gossip, as none of the witnesses had actually participated in or observed first hand any act of violence committed by appellant.

After a rather acrimonious trial, the jury deliberated for the better part of three days, at which time they found the appellant guilty of Counts 2, 4, 7 and 8 of the Indictment. The appellant was committed to the custody of the Attorney General until Title 18 U.S.C. 4208(a)(2) for a period of 25 years on Count 2 and 25 years on Count 4, to run consecutively. Subsequent to the trial in Albany, the same four witnesses twice

again testified against the appellant. In December, 1967, he was acquitted in Queens County, New York of the murder of Ernest Rupoli, the common-law husband of Eleanor Cordero, which charge was almost wholly based on the testimony of the four bank robbery witnesses. Appellant was subsequently tried and acquitted in Nassau County on a charge of first degree robbery.

A key date to both the federal prosecution and the state murder trial was the alleged meeting at the Aqueduct Motel in Queens, New York, which the witnesses testified took place between July 19 and July 23, 1965 (429a). All four witnesses testified to being present at that meeting, at which they testified appellant took charge of the bank robbery ring and admitted his involvement in ordering the murder of Ernest Rupoli.

Since his conviction, appellant has made several motions for a new trial (7A-24A). The first one concerned a memorandum of interview dated March 11, 1966 of the four witnesses at Danbury, Connecticut by then United States Attorney Joseph Hoey. United States v. Franzese, 321 F.Supp 993 (E.D. N.Y., 1970) (492A-493A). This memorandum was not produced at the trial of appellant, but was uncovered at a hearing on a post trial motion for a new trial before Judge Dooling in

United States v. Matteo, 64 CR 460 (475A-491A). The District Court denied this motion, based on a plain reading of the memorandum, see Franzese, supra, and all other motions prior to the one presently before this Court without a hearing.

On September 29, 1975 a motion for a new trial was filed on behalf of John Franzese in the Eastern District of New York. This motion was based upon an affidavit of Charles Zaher, an affidavit of Michael B. Pollack and an affidavit of Thomas Matteo (27A-53A). The basis of this motion was the recantation by Charles Zaher of his trial testimony corroborated by certain documentation. On the date in question counsel for appellant made known to the Court the existence of a letter written by Zaher to Thomas Matteo and smuggled out of Danbury by Ann Zaher, informing Matteo that Franzese had been framed. The reason counsel made this known to the Court was that Ann Zaher was demanding \$100,000.00 for production of the letter. Parenthetically, it should be noted that in prior proceedings there have been underlying allegations and innuendo that appellant would pay any sum of money in an effort to suborn perjury to obtain his freedom. Faced with this background and the outrageous demands now being made for money, counsel sought the Court's aid in securing the letter. Pursuant to petitioner's request a material

witness warrant was issued for Ann Zaher on September 29, 1975. The marshal who executed the warrant was instructed that if Mrs. Zaher produced the letter she was not to be brought before the Court. She did not produce the letter. That afternoon, at a hearing, Ann Zaher, in non-sworn testimony, stated she had burned the letter the day before because of an argument she had with her husband. (71A-107A). The Court authorized counsel to accompany Ann Zaher to a bank in Brooklyn, to view a safe deposit box which had held the letter at an earlier date. Counsel did so and informed the Court by letter the following day that the document in question was not in the vault (107A-109A). November 7, 1975 was set by the Court for argument on the necessity of holding a hearing or granting a new trial based on appellant's motion.

On November 5, 1975 counsel for John Franzese was informed by Joseph Votto, the attorney for Charles Zaher, that Mrs. Zaher had the letter in question and had made it available to Mr. Votto approximately ten days prior to November 5. Mr. Votto informed counsel, and later that day also informed the Court that the delay in producing the letter was caused by his submitting it to a disputed documents expert for analysis. The analysis done by the expert proved that the document in question was in excess of five years of age. On November 5,

1975 the Court was informed of this fact (111A-141A). Also at this in camera discussion there was discussion regarding alleged threats made to the Court as well as concern expressed by counsel that the Court viewed their conduct as something other than professional. During this session counsel made certain representations concerning his client's knowledge of the letter, which the government was subsequently to use in its brief in an effort to defeat the motion. These misstatements were caused largely by the inaccessibility of the appellant to his lawyer, and such inaccessibility had been brought to the attention of the Court in the letter of October 1, 1975 (108a;109a).

On December 12, 1975 a hearing was held before Chief Judge Mishler of the Eastern District of New York. The purpose of the hearing was to ascertain whether or not a new trial should be granted the appellant based on the facts alleged in the affidavits. At that hearing the appellant presented five witnesses. Testifying for John Franzese were Thomas Matteo, Hanna Sulner, Charles E. Zaher, Jr., Ann Zaher and John Franzese. The appellant also attempted to offer into evidence the result of a polygraph test administered to the appellant in the Metropolitan Correction Center on December 11. The Court accepted the background testimony but rejected the testimony of the expert because it considered the machine to be

scientifically unreliable. This subject will be discussed later in appellant's brief.

Thomas Matteo testified to the following facts: that he, Richard Parks and Charles Zaher had been friends for the better part of a decade; that Parks and Matteo had been indicted in a hijacking case in the Eastern District Court and that Zaher was not indicted but had been a participant in that hijacking (147a, 497a-498a), United States v. Matteo, 388 F2d 368 (2nd Cir. 1968). Matteo further testified that during Spring and summer of 1965, he had several conversations with both Richard Parks and Charles Zaher. In fact, Parks had asked Matteo to join the bank robbing team, which offer Matteo rejected because of his distrust of John Cordero. The first offer to join the group was made in the Spring of 1965 (150a-151a). Subsequent to this, in the summer of 1965, after Zaher had left the conspiracy, Matteo had occasion to have another discussion with Richard Parks on Liberty Avenue in Brooklyn. This conversation took place in a new red cadillac convertible which Parks had bragged to Matteo he purchased with the proceeds of the bank robberies (152a) and which became the subject of much cross examination at the trial as the government returned said vehicle to Parks to be sold. United States v. Franzese 392 F2d 954, 963 (2nd Cir 1969) FN. 12.

During this conversation Parks told Matteo that Zaher was no longer part of the conspiracy, that Parks and Cordero were concerned that Zaher, being a heavy user of drugs, might talk if arrested, and were contemplating killing Zaher. Parks also asked Matteo if he wanted to be the driver in Zaher's place in that John Cordero was talking about having his wife drive the getaway car, and this idea did not please Parks (154a). Matteo further testified to visiting Zaher twice in the West Street House of Detention after his arrest. During one of these visits Zaher informed Matteo that a story was being put together to implicate Anthony Polisi in the bank robberies and that the architects of this story were Parks and Cordero (156a). In May, 1966, one month before he went on trial in the hijacking charge, Thomas Matteo met with Ann Zaher by the Carousel (merry-go-round) in Forest Park, Queens. At this time Ann Zaher showed Matteo a letter from her husband, addressed to Thomas Matteo, which she had smuggled out of the Danbury Penitentiary (157a); 503a). The letter is an appeal by Charles Zaher to Matteo for Matteo to join in the testimony against John Franzese or else Zaher will have to succumb to pressure being put on him by both his co-defendant and the government and testify against Matteo in the hijacking case (158a). In addition to the pending bank

robbery indictment against John Franzese, Ann Zaher had also informed Matteo of discussions being had between Parks and Zaher and members of the Queens County District Attorney's Office. These conversations concerned a homicide case which Zaher had discussed earlier with Matteo at West Street. Matteo states he gave the letter back to Ann Zaher, with whom he was on friendly terms at the time. He told her to tell her husband he was crazy. Matteo further testified that at the time he received this letter he did not know John Franzese. In fact, he did not meet Franzese until after September 23, 1966, when they were both incarcerated at the Queens House of Detention, indicted for the murder of Ernest Rupoli. Because he did not know appellant, Matteo testified he told a common acquaintance of theirs, one Benji Castalazo, that Sonny should know they were getting ready to frame him on another case. In May of 1966 there were no State charges pending against the appellant or Matteo. Lester Landy, counsel for Franzese, was never told about the existence of a letter and Matteo's best recollection is that Castalazo was not told of the existence of the document either. Matteo remembers informing Mr. Edelbaum of what he knew but not until after the bank robbery trial (165a-166a). He believes he told Mr. Edelbaum about the letter after the completion of the bank robbery trial. Maurice Edelbaum filed his notice of appearance for John Franzese on December 28, 1966, one month prior to the trial (13a). During

the course of the Rupoli murder trial, Zaher was asked if between January, 1966 and June, 1966 he wrote any letters to friends or relatives, to which he answered "Just relatives" (504a-505a). Matteo further testified that the keys and garage mentioned in the letter relate to a set of repossessor keys which he had in the course of lawful employment and which he and Zaher used to rifle the contents of automobiles in Queens and take the stolen property to the garage and store it until it could be "fenced". These keys would open and start any General Motors automobile up to and including the 1965 model. (181a-182A). Matteo also stated that he had last seen Zaher in December 1967 when Zaher testified against Matteo and Franzese in the Rupoli murder trial.

The second witness for appellant was Hanna Sulner, who testified that she is an expert in disputed documents, whose qualification the Court accepted without question (185a). Mrs. Sulner testified that Exhibit 3, the letter previously mentioned, was brought to her by Joseph Votto for analysis to determine its proper age. Her opinion stated in Court was that the letter was between five and ten years of age, but closer to ten years than to five years (188a). The Court accepted the expert's determination and the government did not cross examine the expert in any fashion (193a).

The next witness for appellant was Charles E. Zaher, Jr., who testified that prior to identifying Appellant in Albany during

the course of his trial he had never personally seen John Franzese (196 a). Zaher's testimony consisted of the facts that he had been a long time friend of Richard Parks; he had driven the getaway car of two bank robberies - those of July 7 and July 13, 1965 - and that any testimony concerning the meeting at the Aqueduct Motel in July, 1965 with the appellant was not true. (239a). Zaher's testimony indicates that the ring leader of the concocted story was John Cordero, that Cordero took the initiative based on a chance remark by an FBI agent during the course of the preparation for or during the actual Polisi trial (204a). Zaher stated that the reason he was selected to steal the cars was because of the keys he had access to and that in fact he did not have any trouble stealing automobiles (198a; 209a). Zaher states that he met Parks the morning after Zaher's arrest, October 9, 1965, at which time Parks explained that John Cordero had testified in the Grand Jury, which was the basis of Zaher's being indicted, and Cordero had implicated Anthony and Salvatore Polisi in an effort to take the heat off the actual bank robberies (197a). Parks further informed Zaher that he should implicate the Polisis' in the bank robberies in the fashion which Zaher ultimately did. Zaher further testified that the reason he went to Anthony Polisi on September 30, 1965 to get money was because Richard Parks'

mother told him Polisi owed Parks \$1,000.00 and that he should try to collect it (199a; 474a). Zaher depicts Cordero as a manipulative individual, highly informed on legal procedure, who sought to create as much corroboration for his testimony as was possible (206a-207a; see also 40a). Zaher is consistent with this position at the hearing when he describes Mrs. Cordero as a treacherous and vindictive woman. It was at Cordero's insistence that Anne Messineo was indicted in place of Eleanor Cordero, who had been arrested on September 30 (201a). Zaher states that he wrote to Matteo to tell him of the pressure law enforcement was putting on him to testify against Matteo, which pressure intensified when the prosecutor in the Franzese case took over responsibility for the Matteo trial because of the involvement of Richard Parks in that case. Zaher was promised he would not be indicted if he would get on the stand, identify himself and state that he was known by the name of "Blackie" (216a-217a). See Matteo, supra.

The next witness to testify for appellant was Ann Zaher, who testified that she had in fact smuggled a letter out of Danbury, Connecticut; that she had in fact shown it to Matteo in Forest Park; and that she had shown it to him in the spring of 1966. Mrs. Zaher testified that in July, 1965 she and her family took a vacation; that their last stop on their vacation

was at North Pole, New York; that she made several stops on the way to that destination; that it took them in excess of a week to reach their destination and that she sent her mother-in-law a postcard postmarked July 31, 1965 from North Pole (508a; 325a-326a). It was Mrs. Zaher's testimony that she and her family went together to the North Pole (346a). Mrs. Zaher testified they returned from this trip sometime the first week of August, between August 4 and August 6, and that she had been away approximately two weeks (329a, 326 a). Mrs. Zaher further testified that she had had a lymph gland infection, that she had been treated by a doctor on July 17, and that she and her family left on vacation within the next four days. She further recalled that on July 26, which is her sister's Birthday, she was not home in 1965 (329a). Mrs. Zaher was not cross examined by the government.

Appellant, John Franzese, testified at the hearing in his own behalf. He denied ever being in the Aqueduct Motor Inn in July 1965 or having seen Charles Zaher prior to January 25, 1967 (334a, 15a). Appellant further testified that any information he received relating to this case he referred to his attorney, Lester Landy who represented him up until his death and subsequent to that said representation was taken over by trial counsel on December 28, 1966. Appellant stated he was told Zaher could help him prove his innocence and that information was relayed to Mr. Landy but Appellant denied any knowledge

that a document i.e., a letter existed in which Zaher had stated exactly how he could help appellant's cause. (339a). Appellant lastly stated he did not know any of the other three witnesses against him and that trial strategy was set by counsel and he placed his fate in counsel's hands.

At the conclusion of appellant's direct testimony the Court asked the following questions:

THE COURT: Do you mind if I ask one?

Why didn't you get up in the trial and say so?

THE WITNESS: I left that to my lawyer. He advised me not to take the stand.

THE COURT: You never said to him, I want to get up and tell my story.

THE WITNESS: He told me not to testify, that's right, your Honor. (342a).

The last witness appellant called to testify was Victor Kaufman, a polygraph examiner. Mr. Kaufman was allowed to testify as to the state of the art of polygraph examination but the Court did not accept his expert opinion into the record. One stated reason for the failure to accept this testimony was that the Court disapproved of the ex parte fashion in which counsel conducted the polygraph. It must be noted that the appellant was brought from Leavenworth, Kansas to New York on December 10 for a December 12 hearing. The Government knew as early as November 5 that appellant was willing to undergo a polygraph examination and

and the Court noted that it was up to the Government to decide whether it wished to join in said polygraph examination (139a). The Government failed to communicate any such agreement to counsel for appellant. However, several times during the proceedings the Court inquired of the Government, if they might not accept such testing under certain controlled conditions.

The Government agreed with the Court that if multiple witnesses underwent polygraph examinations under controlled circumstances and if all tests pointed one way or the other the tests would be very significant (290a, 310a). Further it was conceded that the Government itself uses this unreliable machine (295a, 308a). Then the Court went to a critical and sensitive area in this long and disturbing litigation;

"THE COURT: If you agree with that supposition then the Government should be interested in following through, because I start off with the supposition that the Government, too, is interested in either sustaining the position it has taken so far or confessing that they all lied.

MR. PATTISON: Absolutely.

THE COURT: There is nothing wrong with it. It's good for the soul. It may not be good for the record, but good for the soul. (311a)."

When the witness was excused the following exchange took place;

"THE COURT: I would strongly urge the Government to

go along with it, and invite any other suggestion you have.

MR. PATTISON: We may very well agree. (320a)"

On Monday, December 15, 1975, the Government informed the Court by letter that it would not consent nor produce their witnesses for polygraph examination under the controlled circumstances outlined by the Court.

ARGUMENT

I. The Trial Court Erroneously Denied Appellant's Motion For a New Trial

In a habeas corpus proceeding the applicable three pronged test to determine if a witness' recantation necessitates a new trial is whether

"a) The court is reasonably well satisfied that the testimony given by a material witness is false.

b) That without it the jury might have reached a different conclusion.

c) That the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." United States of America ex rel. Martin Sostre v. Festa 513 F2d 1313 (2nd Cir. 1975); United States ex rel. Vincent, 491, Fed. 1326 (2nd Cir. 1974); Larrison v. United States, 24 F2d 82 (7th Cir. 1928). Recently this court rejected point (b) of the so-called Larrison test, and substituted the more stringent "probability test," first enunciated in Berry v. Georgia, 10 Ga. 511, 527 (1851); United States v. Stofsky, 527 F2d 237, 243, 246 (2nd Cir. 1975).

Motions for a new trial have such stringent standards because courts are inherently suspect of the motivation behind the recantation. For this reason such motions are disfavored and should be granted with great caution, United States v. Costello, 255 F2d 876 (2nd Cir. 1958). The foundation for this standard is set forth in Larrison supra at 88, "Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subservice of the proper administration of justice."

A standard, no matter how wise in its general application, must not be applied blindly or unthinkingly to a specific situation when it is shown that the underlying reason for the standard is inopposite to the specific fact situation. There has been no showing of any inducement to any witness in this motion. In fact the contrary is true. Demands were made of the petitioner. Ann Zaher demanded payment of \$100,000 of petitioner in exchange for the letter (503a) which she asserted would prove petitioner's innocence, (42a-45a). Mrs. Zaher persisted in this demand from the time she informed counsel of the letter in August, 1975 until September 29, 1975. On that date

counsel went to the trial court with the problem. The problem was presented to the Court in the following manner, there is a document which states Mr. Franzese was framed, but the person in possession of that document will make it available only if paid \$100,000. On the basis of counsel's affidavit the court authorized the issuance of a material witness warrant for the arrest of Ann Zaher and the production of the letter. (71a-106a). If it was petitioner's desire to subvert justice he certainly would not have brought the problem presented by the existence of this letter, exhibit 3, to the court, before the authenticity of the letter had been verified by scientific tests. The use of the judicial process to secure evidence, which if it had turned out to be forgery or a recent fabrication could have seriously undercut the integrity of petitioner's motion, is indicative of petitioner's desire to facilitate the proper administration of justice. There is not one scintilla of evidence that anything improper was suggested or done to secure the testimony and documents produced before the District Court.¹ To the contrary the

1. On September 29, 1975, Charles Zaher testified his wife Ann had told him a year previously that petitioner's son Michael had offered her \$10,000 for production of a letter (89a-90a). Mrs. Zaher told her husband she told Michael Franzese she no longer had the letter. (90a). This was hearsay as to Charles Zaher and the Government chose not to question Ann Zaher about this offer when it had the chance on December 12, 1975.

record establishes that petitioner withstood all demands made upon him for payment in exchange for favorable testimony or exculpatory documents. There is affirmative evidence in the record establishing the integrity of this motion and therefore it should not be viewed with the skepticism normally afforded motions for a new trial.

A. WAS ZAHER'S TRIAL TESTIMONY FALSE

Charles Zaher testified both at the trial of Anthony Polisi in January 1966 and that of the appellant in February 1967. Each time he testified he implicated Polisi and then appellant as the mastermind of the two robberies in which he participated (449a). At each trial his testimony only concerned the robberies of July 7 and July 13, 1965.

Zaher testified his role was that of driver of the getaway car and procurer of a stolen car to be used in the getaway. In performing this role he stole two cars, a 1965 Pontiac which was used in the robbery of July 7 and a 1961 Buick used in the robbery of July 13, 1965. (408a-410a, 418a, 425a, 426a, 439a, 442a).

Zaher testified that the last involvement he had in the conspiracy took place on July 21, 1965 at the Aqueduct Motel when the leadership of the conspiracy changed. Zaher was brought into a room on the second floor in which John Cordero and appellant were already present (402a), and Cordero

was explaining the quartets displeasure with the results of their first two bank robberies. (403a, 492a). Zaher's only contribution to this conversation was:

"A. Well then, I told Mr. Franzese that I was having a hard time stealing cars, and Mr. Franzese said:

"Okay, from now on, I will take care of these banks personally, from the bank right on down to the stealing of the cars." (404a).

In his trial testimony Zaher states he left the conspiracy because shortly after the alleged meeting he was informed Polisi had ordered him killed (427a, 429a) and as a result of this he took a trip upstate with his family. (407a). He states that this trip took place between July 29 and August 8, 1965 and he and his family worked their way up to North Pole, New York.

Shortly after the arrest of Parks, Smith and Cordero, Zaher testified he went to see Polisi, with the sister of Richard Parks to get bail money for Parks. Polisi gave him \$200. and told him to get lost. (445a, 474a). Zaher also denied at trial having spoken to any of his co-conspirators between the date of their arrest and the date he made his first statement to the FBI. (432a, 433a).

At the close of his testimony Zaher was asked if he had spoken to a Prison Guard by the name of Gucci, to which he replied affirmatively. Gucci allegedly relayed a threat of

death to Zaher from the appellant should Zaher testify against the appellant, (452a-454a). This hearsay testimony was not admitted for the truth against appellant but rather to explain the witness' state of mind. Defense counsel moved for discovery of any statements made to law enforcement by the witness concerning this threat under 18 U.S.C. 3500. None existed, the prosecutor explained his failure to take notes thusly; "I don't even think I took any notes at that time, your honor, because these individuals, at the time, were telling us all kinds of things in West Street" (456a).

The defense has contended from the very beginning of these proceedings that the stories told by Smith, Parks, Cordero and Zaher were fabrications. This is documented as early as January 31, 1967 when trial counsel states:

"As a matter of fact, your honor, there is the contention of my client, most sincerely, that he does not know any of these government witnesses." (368a),

and continues up until and including December 12, 1975 when appellant testified "I had nothing to tell him [trial counsel] because I knew none of these defendants" (352a). During the trial the court took note that the cross examination of Zaher was intended to show that the entire story was a fabrication (436a) or a concocted story (447a-448a). See also United States v. Franzese 392 F2d 954, 961 (2nd Cir. 1968). Outside of the testimony of the four bank robbers the government did not produce

one iota of evidence implicating appellant in this criminal activity. Whatever evidence of independent corroboration which was presented implicated the defendant Potere alone and the court so stated. Franzese supra 964 Fn. 13.

Now comes Charles Zaher and confirms that the entire story was a fabrication aimed at gaining leniency for himself, Parks, Smith and Cordero. He claimed he was never present at a meeting at the Aqueduct Motel in July 1965 nor had ever seen appellant prior to his in court identification, (200a-209a).

In 1965 Charles Zaher was a strung out heroin addict who was not gainfully employed and who supported himself by a steady stream of criminal activity. Since his release from prison in 1968, Zaher has had two brief encounters with the law in 1969 and for the past six years has been steadily employed in the same job earning in excess of \$20,000 (36a). For these six years Zaher has maintained a home in Queens, New York and has had a published telephone number. See Sostre supra. Such is hardly the conduct of a man who is living in fear of retribution.

Why then should we believe the Zaher story circa 1975 rather than the story circa 1967. Because appellant's motion is based in a large part on supporting corroboration for Zaher's claim of fabrication.

Appellant places great weight upon the letter, exhibit 3, written by Charles Zaher to Thomas Matteo and smuggled out of

of Danbury in May of 1966. This letter has been accepted as authentic (193a) and the court has conceded

"A plain reading of Zaher's letter would indicate that Zaher together with the accomplices, planned to fabricate testimony concerning the July 21, 1965 meeting to implicate Franzese, Florio, Crabbe and Matera" (384a).

This statement alone should have been dispositive of appellant's motion and a new trial ordered. The record is devoid of facts which can be cited to contradict the plain reading of this letter. But this letter becomes even more compelling when analyzed line by line and compared to the recantation of Zaher as contained in his affidavit and hearing testimony.

The first line says "I hope by now you got some sense and listen to Ann." Testimony revealed that the contents of the letter, a prior letter, statements made to Matteo at West Street and other messages taken to Matteo formed the backdrop for this letter. Ann Zaher appeared in court and was certainly less than warm to appellant's cause based on our action on September 29, 1975 in attempting to gain possession of that letter, yet the prosecution chose not to cross examine her. (330a). "Richie is going to testify against you, and they want me to." Parks was indicted along with Matteo (497a) and Zaher was informing his friend that Parks would be a witness against him. He also indicated he was under great pressure to testify and was most reluctant to do so. (216-217a). See also Matteo supra. Zaher was not the only defendant who felt he was

under some coercion by the government in May of 1966. In a letter to the prosecutor dated May 21, 1966, Parks and Smith stated "you forced me and Jimmy into this case" (473a). That letter, and numerous others, was written to the prosecutor by the witnesses with the stated purpose of impeaching their own testimony, yet the letter by Zaher was smuggled out of Danbury, another strong indicia of the truthfulness of its contents. "You see how we framed this guy Tony and I have to go along with the guys to frame this guy Sonny too." This sentence provides the ever missing cornerstone of the defendant's fabrication and concoction argument. The phraseology is strongly corroborating of the truth of the allegation. Tony refers to Anthony Polisi, and his case is referred to in the past tense. Polisi was convicted in January 1966. "This guy" indicates lack of familiarity with the individual. "I have to go along with the guys", a plain reading of the transcript indicates Zaher was not the leader of these four men. Zaher states Cordero was the initiator of this scheme based on the chance remark of an FBI agent (204a) Smith unwittingly corroborates Cordero being the leader, his motive and Franzese was first mentioned by the prosecution to him. (471a-472a). "To frame this guy Sonny too". The word frame is defined in the American Heritage Dictionary of the English language thusly "To arrange or adjust for a purpose" . . . SLANG a. to rig evidence or events so as to incriminate (a person) falsely."

The dictionary's language could not be more descriptive of what the defense at trial was claiming. It was counsel's claim that appellant was incriminated falsely by the witnesses for the purpose of achieving lighter sentences for themselves. This conduct is spoken of as an event which has not yet occurred. In May 1966 the Franzese case was pending in the District Court, ultimately to be tried in January 1967.

"for these . . . bank robberies. I should have stayed robbing the cars with you, at least there was more money in it". This shows his disgust for his plight because of the failure to make a lot of money. He next incriminates himself and Matteo in a totally unrelated criminal endeavor, for which at the time, he did not have immunity.² Such language would never be used by one knowledgeable in criminal responsibility unless he was sure the letter would only be seen by a friend. It also provides an explanation as to why Zaher was assigned the role he was in the robberies of July 7 and 13, 1965. He had a background, expertise and wherewithall to steal cars successfully. "How are you doing, Ann told me she gave you

2. The Federal Rules of Evidence exclude from the application of the hearsay rule "[a] statement which . . . so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Fed. R. Evid. 804(b)(3).

my keys", these are the reposessor keys that Zaher and Matteo testify about at the hearing. They had the capability of opening, starting and therefore stealing any General Motor car up to and including the 1965 Model year.³ What cars did Zaher steal? A Pontiac and a Buick, both manufactured by General Motors. (418a-425a) There is nothing in the record of this case which supports the fact that Zaher was having difficulty in stealing cars for the robberies except Zaher's naked assertion at the trial. The letter, the facts of theft as testified to, and the testimony at the hearing all establish beyond any contradiction the falsity of Zaher's testimony on this point at the trial. "Do you still have the garage?" Again a statement against penal interest. What purpose was had in making it unless to convince his friend that Zaher possessed sufficient incriminatory information against Matteo so that Matteo could be in trouble if Zaher decided to cooperate against him, and this thinly veiled threat was aimed at gaining Matteo's compliance with the wishes of Zaher and friends. "Tom they really have me squeezed in, I tried to bug out but I didn't make it". This refers to the pressure being exerted on Zaher, especially relating to the prison term he faced. Zaher tried

3. One reason the Larrison court supra did not credit the recantation was because the two witnesses testified similarly despite being incarcerated in separate prisons. The court found it inconceivable two witnesses so far apart, would fabricate the same story. Matteo has not seen Zaher since December 1967, whereas the four witnesses were kept together continuously in preparation for the trial.

to commit suicide, or at least get a psychiatric disqualification by having Cordero cut his wrists in November 1965.

"I don't mind testifying against guys I don't know, but you are a different story." This only reinforces the earlier mention of Tony and Sonny as "this guy", there was an obvious lack of knowledge of these men and therefore within whatever code of ethics Zaher applied he felt he could justify testifying against them. But not against someone he knew. "If you go along with us", this obviously was meant to mean if you don't go along with us (230a) "I will have no choice. Listen to Ann, she will run down the story to you". Again it must be pointed out that the government chose not to cross examine Ann Zaher concerning her knowledge of her husband's activities.

In support of exhibit 3, the appellant produced a second letter written by Charles Zaher on June 15, 1966 to his wife and given to counsel by his wife as an inducement to pay the money demanded for the letter to Thomas Matteo. This letter speaks of Matteo's recent conviction in the hijacking charge which records of this Court substantiate as having taken place on June 13, 1966 (498a). It further makes mention, with emphasis added by underlining, of the earlier letter to Matteo.

In this letter Zaher indicates that Richard Parks, the author of the May 21 letter, mentioned earlier, had knowledge of the letter given by Ann Zaher to Matteo and also of Matteo's response to that letter. The implication of Parks in the Zaher letter is again corroborative of appellant's contention that the witnesses against him were attempting to manipulate events so as to maximize the consideration they would receive. If exhibit 6 means anything then a plain reading of the letter shows how the witnesses were aware of each others conduct and all actions which would affect any particular witness individually or the four collectively. The high probative value of this letter is easily comprehended when one realizes that Zaher did not mention Cordero nor did he mention Smith because it was Parks and Zaher who testified against Matteo and it was Parks who received a suspended sentence as a co-defendant who testified against Matteo and Zaher who was not indicted because he testified against Matteo and Franzese. (500a)

The Court erroneously concludes that the postcard, petitioner's exhibit 7, dated July 31, 1965 corroborates the trial testimony of Charles Zaher (388a,429a). Ann Zaher testified that that postcard was written from the North Pole, New York which was the last stop in a trip in which she and her family made. They made all of their stops as they went north (325a).

The family was away for a period of time between (12) days and two weeks (326a, 328a) and returned home between August 4 and 6, 1965. (328a). Mrs. Zaher further testified the family did not reach North Pole in the first week of vacation(326a).

In July 1965 Ann Zaher testified she underwent medical treatment for a lymph gland infection before she left on her trip (329a). She further testified that she checked with the physician who treated her on December 11, 1975 and found her last visit to the doctor concerning this ailment was on July 17, 1965 (329a). Mrs. Zaher continued her testimony by stating that she and her family left for their trip within four days of July 17, 1965. She further substantiated her testimony by stating that July 26 is her sister's birthday and in 1965 she was away from home on that birthday. (329a-330a).

To understand the importance of this testimony one must remember that Charles Zaher testified at the trial that the organizational meeting at the Aqueduct Motel took place on July 21, 1965 (429a) and his co-conspirators testified to dates between July 19 and July 23, 1965. Zaher further testified he stayed at a motel subsequent to this organizational meeting, (429a) although the government did not present any motel records to corroborate

this statement, and then went upstate with his family on July 29 (407a), July 30 (429a). Zaher further indicated that stops were made at other recreational areas before they reached North Pole. (388a, 407a). Charles Zaher was unable to provide the names of any of the hotels he stayed at during this trip. (407a).

Ann Zaher's testimony, related to dates and documents which one would be likely to remember and are verifiable, clearly establishes Charles Zaher left New York well before July 29, 1965 and corroborates her husband's assertion he wasn't at any meeting with the appellant, because in all likelihood he was on vacation with his family. Mrs. Zaher's testimony explains why Charles Zaher felt compelled to justify his absence from his home by stating he stayed in a motel near LaGuardia Airport, unable to pinpoint the exact motel or the name he used to register either his own or an alias (428a) and why Zaher did not recall any of the names of the motels he stayed at on his family's vacation (407a). Such evidence, if available, could have proven that Zaher's story concerning his activities during the crucial time period was in fact false. Information concerning these accommodations was not even sought when federal authorities spoke with Ann Zaher concerning her

husband's participation in the robbery of July 30, 1965 (331a). In fact there was an admitted lack of a field investigation by agents in this case other than interviewing the co-conspirators who claimed they could implicate the appellant in their bank robberies. Presenting these four men to a Grand Jury was the extent of the investigation done in this case. (485a, 488a). Thus all documents in existence in 1965 which could corroborate or destroy the credibility of the story told by these men were not explored and have been lost by the passage of time.

Ann Zaher did not submit an affidavit in support of appellant's motion (382a). Such failure is readily understood when considered against the proceedings of September 29, 1975. However, her testimony establishes that the trip was undertaken sometime during the period when this meeting allegedly took place. If the family left four days after the doctor's visit that would put it at July 21, 1965, if they left eight (8) days prior to July 31, the date of the postcard, then they left on July 23, 1965, if fourteen (14) days before August 6 then it makes it July 21 or if twelve (12) days prior, July 23, 1965. Thus, using any date given by Ann Zaher it is manifestly clear that her husband lied when he testified he left New York on

either July 29 or 30, 1965. Ann Zaher's testimony stands unimpeached for this court's consideration.

Judge Mishler, in his decision, places great weight upon that part of the trial testimony where Zaher states he decided to cooperate, and exclude appellant, before he spoke with his three co-conspirators. (388a, 389a). The court accepts his stated reason for so doing as fear of appellant (389a), and implicitly rejects his testimony at the hearing concerning a conversation with Parks in West Street on October 9, 1965 (197a). Zaher's trial testimony is inconsistent in logic. Why would he fear appellant and be willing to implicate Polisi? Polisi had allegedly ordered Zaher killed (386a), which caused Zaher to flee the conspiracy in fear, yet to explain why Zaher went to Polisi in October for money in behalf of Parks the witnesses claimed the "contract" was called off by Franzese. (387a, FN. 15). Accepting this set of facts as true for purposes of argument why then would Zaher fear appellant and not Polisi? There is no reason, Zaher did not mention appellant on October 11, 1965 because Zaher had not had any contact with appellant and therefore he had nothing to tell authorities. Yet to keep his testimony consistent, the four witnesses had to justify Zaher's approach to Polisi on October 1, 1965.

Zaher now states he went to Polisi because Parks' mother said Polisi owed her son \$1,000 (30a, 199a). Polisi gave Zaher \$200.00. On October 1, 1965 Parks was held on bail in excess of \$20,000. A payment of \$1,000 would not even have paid the bondsman's premium let alone provide the necessary collateral (25a). Zaher's recantation is corroborated by the testimony of Julius Itzkowitz, the attorney for Richard Parks, who testified that Parks told him Polisi still owed Parks \$800 of an original debt of \$1,000 (474a). If this money was an obligation for bail why would Parks only demand \$800.00? Because Parks was trying to raise money for his bail. He went to all those to whom he had loaned money in an effort to raise the money he needed to gain his freedom. The transcript of the trial establishes that he spent freely during the bank robbery spree, including the purchase of a new Cadillac. The witnesses' problem was to explain why Zaher went to the persons who had ordered his death and from whom he had fled, (Polisi). This dilemma was solved by fabricating testimony that Polisi had been ordered not to kill Zaher by appellant, and yet Zaher testified that he feared appellant and not Polisi. This was a logical inconsistency and just not the truth. Zaher did his friend a favor and attempted to gain repayment of a

loan, and he did so without any fear or concern for his personal safety. The testimony concerning fear, which so permeated this trial, has already been brought into question by the court in United States v. Franzese, 392 F2d 954, 958 (2nd Cir. 1968).

Charles Zaher testified at the hearing and in his affidavit that the scheme to fabricate testimony implicating appellant was discussed over a period of time subsequent to the Polisi trial in January 1966. The government attempted to undercut this testimony by pointing to the testimony of Robert Helfand, the attorney for John Cordero at the trial. The government maintained that the record establishes that Cordero implicated appellant to Helfand in October 1965 in a memorandum of law submitted to the court. Appellant's memorandum of law (364a-376a) did not deal with this subject and thus a letter was written the court in an effort to set the record straight (377a). Despite this, the court accepted the government's version of this testimony. (391a-392a). The government's efforts to examine Mr. Helfand on redirect examination were aimed at undercutting the cross-examination which attempted to establish Cordero's testimony was a recent fabrication (458a-466a). The government wanted to elicit a

prior consistent statement by Cordero before he had a motive to fabricate. That testimony would be that Cordero implicated appellant during his first interview with his attorney. (462a). Helfand in fact did so testify (464a) out of the presence of the Jury. However, subsequently the witness placed this conversation in the middle of October after which the following occurred:

"MR. GILLEN: He was arrested October 1.

How long did you see him after his arrest?

Would this help you to refresh your

recollection. He had assigned counsel,

Mr. Rudy Di Blasi, for some period of time.

THE WITNESS: Right, I don't know how long
that was.

MR. GILLEN: I don't know either.

THE COURT: Well, because of the last
statements, I am going to
sustain the objection.

MR. GILLEN: Yes, Sir.

THE COURT: It may not be at a time when
there was a reason not to
fabricate". (465a)

This testimony, rather than contradicting Charles Zaher's assertion tends to corroborate his testimony. (391a). But this corroboration is further established by the records of the Clerk of the Court for the Eastern District of New York. A review of the docket sheet for case 65 CR 443 shows entries from October 8, 1965 through November 26, 1968 (25a-26a). The only attorney listed on this sheet appearing for John Cordero is Rudolph Di Blasi (25a). Docket sheet entries for 66 CR 161, the Eastern District Docket Number for appellant's case, show John Cordero appeared with counsel on April 29, 1966 and pled not guilty to the indictment (8A). A review of docket entries for 67 CR 17, the entries for the Northern District to which this case was transferred for trial, shows that a notice of appearance was filed on behalf of John Cordero by the firm of Helfand and Lesser on April 29, 1966. (4a). Thus court records establish that Mr. Helfand did not represent John Cordero prior to the date of the appellant's indictment (7a) and therefore his testimony if relevant in any fashion, will corroborate Charles Zaher that the appellant's involvement was fabricated after the Polisi trial rather than contradicting Charles Zaher.

Corroboration for Zaher's recantation comes from a unique place, the testimony of James Smith. (471a-473a). Zaher states that the name Franzese was first mentioned to him by a member of the prosecution team (32a, 203a) and Smith says the name was first mentioned to him by the prosecutor (472a); Zaher states Cordero was the first to take up the idea of implicating appellant (32a, 204a) and Smith provides the motivation, concern over the consideration on sentence he would receive since he had not testified at the Polisi trial, (471a, 201a), (see also T. TR . 2964) although he was the only one who testified in the Grand Jury. See Polisi 416 F2d 573 supra. Smith further corroborates Zaher on the timing, relating to the Polisi trial, of when appellant was first implicated. Smith stated said implication occurred after the Polisi trial (471a).

Another unique source of corroboration for Zaher's assertions that the witnesses were telling the government different stories to see which the government would accept is the government itself. (34a). The prosecutor himself admitted this at the trial (456a) and also admitted Cordero's role in manipulating events to his own benefit (35a, 40a).

Joseph Hoey, then United States Attorney, also corroborates Charles Zaher. Hoey states under oath that the first time he knew from these four witnesses that they would implicate appellant was on March 11, 1966 (475-493). This knowledge was transmitted to him at the prison in Danbury, Connecticut (476a). Also despite having previously testified against Polisi the witnesses attempted to extract additional promises of consideration from the government for testifying against appellant.(478a). Parks even went so far as to ask for an immediate release from jail (479a). The witnesses obviously felt they would gain greater consideration for testimony implicating John Franzese than for convicting Anthony Polisi.(237a).

The testimony of Charles Zaher at the hearing was corroborated by documents, one of which was authenticated by an expert who does not know Zaher, a one-time friend who has not seen Zaher in ten (10) years (147a), his wife who was certainly not friendly to appellant's cause, the appellant himself, plus Court records and other documents. The record of the hearing is devoid of any inconsistency of material fact and establishes the truthfulness of the recantation and the integrity of appellant's motion. Once the credibility of Charles Zaher is established it is clear that his recantation establishes that appellant's conviction was based in large part on perjurious testimony which if placed before a jury

again would probably result in an acquittal of the appellant. Therefore, a new trial should be granted. United States v. Pollsi, 416 F2d 573 (2nd Cir. 1969); United States v. Stofsky, 527 F2d 237 (2nd Cir. 1975).

B. WOULD ZAHER'S NEW TESTIMONY BE LIKELY
TO PRODUCE A DIFFERENT VERDICT

The crucial question represented by this prong of the testimony is whether or not Zaher's testimony as supported by testimonial and documentary corroboration would probably have resulted in the appellant's acquittal. To answer this question we must look at the quality and quantity of proof offered by the government at the trial. The government's proof is limited to the testimony of three self-confessed bank robbers, who have admitted to implicating another on a prior occasion in the same role as appellant, with an admitted motive to fabricate, and with no other corroboration of appellant's participation in the criminal endeavor. In a new trial Zaher would show that the other three lied when they said he was at a meeting of July 21, 1965. He would also establish that he lied as to the date he left New York, the reason he left New York, his participation in a con-

EDITOR'S NOTE

Pages 44 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

C. DID THE APPELLANT EXERCISE DUE DILIGENCE
IN UNCOVERING THE ZAHER RECANTATION?

At the outset it is important to realize that appellant has been incarcerated since March of 1970. Thus it is apparent that the motion for a new trial was not based on evidence available at the trial but which defense counsel decided not to use. Stofsky, supra, 245. The entire thrust of the defense in this case was that the witnesses, for their own benefit, had fabricated testimony to implicate appellant in an effort to reduce whatever period of incarceration they might face. In attempting to establish this, defense counsel used a myriad of prior inconsistent statements among which were grand jury testimony, FBI reports and letters written to the prosecutor. It is beyond the pale of belief that appellant would have known of the existence of the Zaher letter of May 1966 and not have confronted Zaher with it at the trial. The District Court found that Franzese was aware of the contents of Zaher's letter and Franzese himself testified at the hearing that he had received word that Zaher would not be a witness against him and had information that could establish his innocence. Based on this information, an affidavit was prepared for appellant requesting, pursuant to Rule 17 of the Rules of

Criminal Procedure, that he be allowed to depose Charles Zaher (509a-511a). This affidavit was submitted on September 9, 1966. On September 26, 1966 said motion was withdrawn (12a). The only intervening event in this 17 day time period was the indictment of Franzese and Matteo by a Grand Jury sitting in Queens County charging them, among others, with the murder of Ernest Rupoli. It should also be pointed out that Matteo was not a defendant in the federal prosecution. Matteo testified at the hearing that he never told Lester Landy of the letter and that he spoke to Maurice Edelbaum about the letter some time after the bank robbery trial. Mr. Edelbaum did not enter this case until December 28, 1966.

During the pendency of this litigation, Charles Zaher was incarcerated. The litigation brought forth allegations of intimidation on the part of Franzese towards these witnesses. They proclaimed their great fear of the defendant. Under the circumstances any attempt made by appellant or anyone in his behalf to approach a member of the family of Charles Zaher would have brought forth allegations of threat and intimidation.

However, during the murder trial, in which Matteo was a defendant, efforts were made to gain access to this letter and Mrs. Zaher stated that during the trial of Franzese and Matteo

she received a call from a Mr. Kleinman (William Kleinman represented Thomas Matteo in this proceeding) who asked her to produce this letter. Mrs. Zaher declined to produce the letter pursuant to that request (44a). During the examination of Charles Zaher at the Queens trial, Zaher was asked on cross-examination:

"Q. Well, during the time, sir, between January of '66 and June of '66, were you writing letters to anybody?

A. January 1966 to June 1966?

Q. Yes.

A. I believe I wrote some letters to Mr. Gillen. I don't know if it was around that time, but I wrote letters to him while I was in jail from October 8, 1965 until I was released.

Q. Did you write any letters to anybody else, any friends or relatives of yours?

A. Just relatives.

Q. You wrote to relatives?

A. Yes, sir." (504a, 505a)

Again Zaher's answer frustrated the ability of the defense to uncover a most valuable document.

In 1975 for the first time Ann Zaher acknowledged the existence of such a letter to a representative of John Franzese (42a-44a). Mrs. Zaher placed a price tag of \$100,000 on this letter. The appellant, unable to gain access to the letter to verify its authenticity, invoked judicial process in an effort to secure the letter for presentation to the Court for its consideration (71a-107a). Even after undertaking the extreme action of arresting a woman who had never had any previous personal contact with law enforcement and bringing her before a District Court Judge, Ann Zaher still steadfastly maintained that the letter had been burned the day before. In fact, the letter had not been burned but still existed as was ultimately established at the hearing of December 12, 1975. Thus as late as September 29, 1975, any effort made by appellant to secure the letter was frustrated by those in possession of the document. Under the facts presented it is inconceivable how appellant can be accused of failing to act with due diligence.

II. The District Court Should Have
Conducted Polygraph Examinations
In Conformity With the Guidelines
Enunciated At The Hearing

The facts in appellant's case are bizarre to say the least. From the outset of this litigation there have been two separate stories of who the leader, if in fact there was a leader, and mastermind of these bank robberies was. Two women, Eleanor Cordero who was arrested but not indicted and Ann Messineo who was indicted twice, severed twice and finally dismissed, have been implicated as the driver of the getaway automobile and neither has ever been tried on those charges. The conviction of Anthony Polisi was reversed because the government did not turn over statements made by John Cordero which contradicted those made by his co-conspirators at the Polisi trial. In fact Cordero did not testify at the Polisi trial because of those statements, and as pointed out earlier, that lack was the motivation which brought this case into existence. Additionally, the entire thrust of counsel's cross examination at the trial was to establish that the witnesses' testimony was fabricated.

Ten years after the crime Charles Zaher now recants his testimony. This recantation is supported by a letter which

supports the contention that the entire case was fabricated by the four confessed bank robbers to gain lenience for themselves. Armed with possession of this testimony and letter, counsel met in chambers with the court on November 5, 1975. (111A). During this conference a polygraph examination was proposed as a method which could be useful in clearing the ever increasing pollution of fact surrounding this case. (138A). Appellant argued for permission to take such a test and the court left it up to the government whether or not it wished to be a party to such testing. (139A). On December 11, 1975 a polygraph examination was administered to the appellant at the Metropolitan Correction Center in New York.

On December 12, 1975 appellant called Victor Kaufman to the stand in an effort to establish the reliability of the art of the polygraph examination. Appellant wished to have the expert witness testify to the results of the test given by him. The court refused to take such evidence of an ex parte examination and questioned the expert on the reliability of his science. (284a-322a). The government denied the reliability of the test although it was admitted the government uses the test.⁴ (295a). In answer to this argument the following occurred:

4. In 1973 the Department of Justice and the FBI owned 26 Polygraph machines and performed 79 tests, the Department of the Treasury owned 11 machines and gave 57 tests and the Department of Defense owned 390 machines and performed 6,325 tests. Thirteenth Report By the Committee on Government Operations, House Report Number 94-795 January 26, 1976.

THE COURT: If the Government buys the underlying supposition that even an unreliable test multiplied a number of times reaches the same result, is entitled at least a close look.

MR. PATTISON: Yes, Your Honor, I would say that. I think another matter to be thrown into the mix is the number, multiples, that certainly -- certainly a hundred would be more accurate than ten.

THE COURT: I would --

MR. PATTISON: Ten more accurate than one.

THE COURT: I would like those that are not in this case at the present time to be tested without any information, rehearsal, instruction.

I think that would be convincing to me, if I knew, for example, that Mr. Crabbe, Mr. Matera were brought in and if they said, Number one, they were never at that meeting, it never happened. Franzese wasn't there, that was -- and that was confirmed by similar tests given to others, I would say that you can't disregard it.

MR. PATTISON: Your Honor, --

THE COURT: If you agree with that supposition then the Government should be interested --

MR. PATTISON: Your Honor, I would also only point out --

THE COURT: -- in following through, because I start off with the supposition that the Government, too, is interested in either sustaining the position it has taken so far or confessing that they all lied.

MR. PATTISON: Absolutely.

THE COURT: There is nothing wrong with it, It's good for the soul. It may not be good for the record, but good for the soul. (310a-311a)

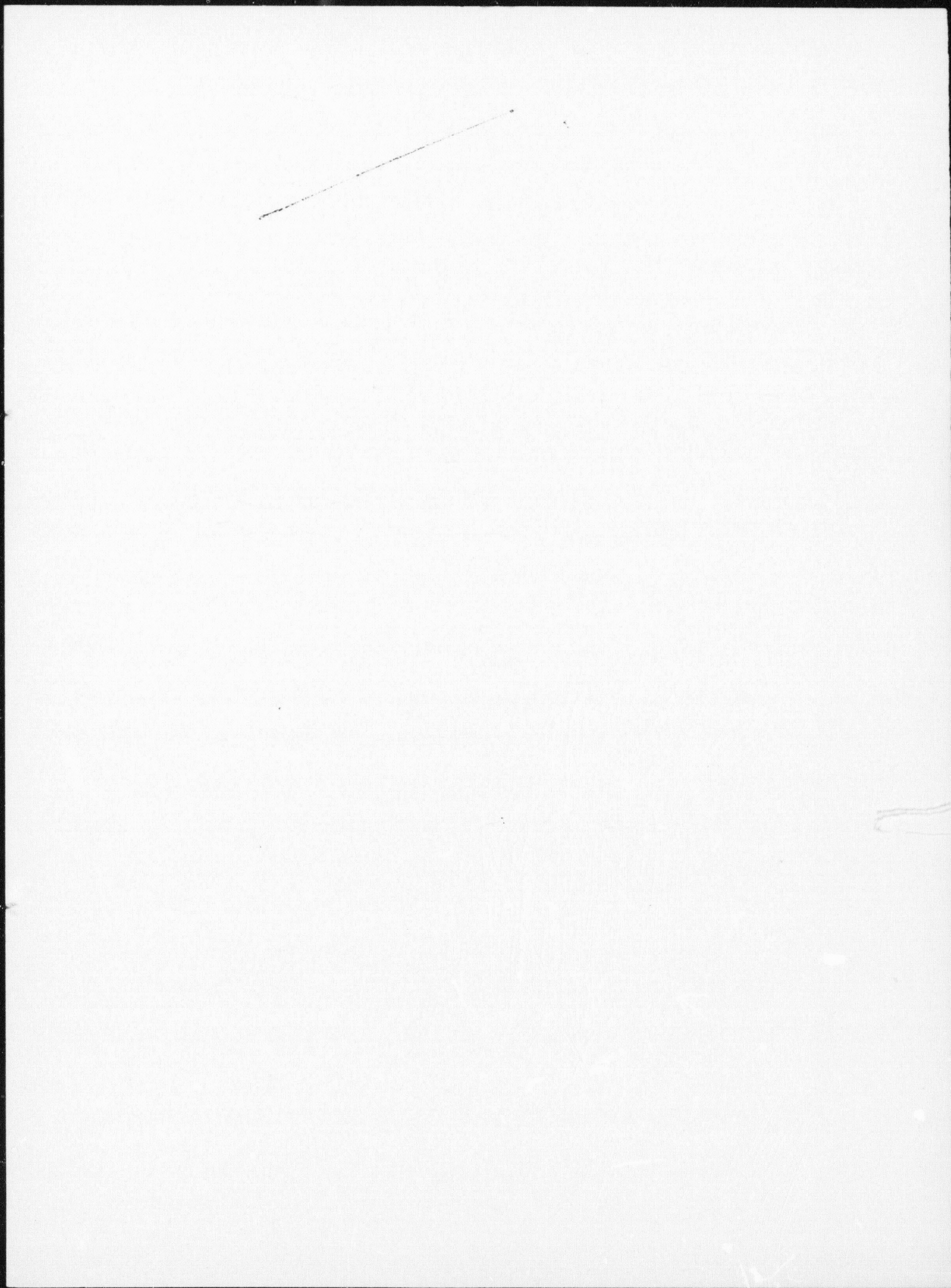
This is an unusual case which called for unusual methods to resolve it. The government's failure to agree to at least explore the possibility of giving such tests under the controlled circumstances was but yet another indication of their lack of commitment to establishing the truth in this disturbing case. This lack of commitment surfaced earlier when the government maintained that appellant's Exhibit 3 could not be tested to authenticate or disprove the date said document was written.

The great weight of judicial opinion on the subject of polygraph examinations seems to point towards the exclusion of such testimony. Some courts however have recognized a discretionary exclusion rule. See United States v. Ridling, 350 F. Supp. 90, 94 (E.D. Mich. 1972). The court in United States v. Wainwright, 413 F2d 796, 803 (10th Cir. 1969) recognized that in a proper case polygraph evidence may be admissible. See United States v. Oliver, 525 F2d 731 (8th Cir. 1975). In Oliver, *supra* 736 the court applied the discretionary rather than the per se exclusionary rule because of the unique circumstances of that case. In United States v. Betham, 470 F2d 1367 (9th Cir. 1972) the court affirmed the District Court's use of discretion in rejecting the testimony of the polygraph examiner. The court said however that a strong showing had been made by the defendant concerning the reliability of the test and left the door open for the admission of such tests in the proper case thusly, "We do not hold that polygraphic evidence is never admissible." *id.* 1368

The polygraph examination is a new way to shed some light on those select few legal cases which seem to defy traditional resolution. These type cases generate continuous argument which never seems to resolve the critical issue. This is such a case. Another such case was U.S. v. Dioguardi,

72 CR 1102, before Judge Weinstein in the Eastern District of New York. In that case the defendant was indicted for submitting a false application for a loan to a Federally insured bank. Before trial another man, Michael Laino, came forward and admitted it was he who had filed the application. Both men weighed in excess of 300 pounds. In identifying the defendant, bank officials had relied on the unique size of the defendant in making this identification.

At a hearing on November 30, 1972 the government prosecutor stated he had strongly urged his superiors in the Department of Justice to consent to the polygraph examination due to the peculiar nature of the case, but that the Department would not consent for fear of establishing a bad precedent. A hearing was then held and the government presented Nat Laurendi, the examiner for the office of the Manhattan District Attorney, to testify about the polygraph. Laurendi testified against presentation of the polygraph charts to the jury but stated "but the opinion of the examiner should be brought to the attention of the prosecutor and the Justice presiding if an opinion is formed that a defendant is telling the truth." Judge Weinstein then appointed Detective Laurendi as the court's expert to examine the two parties pursuant to Rule 28 of the Rules of Criminal Procedure and to Rule 706 of



the then Proposed Rules of Evidence. The final solution to this entire situation was the indictment against the defendant Dioguardi was dismissed on application of the government and Michael Laino entered a plea of guilty to committing the crime previously charged against Dioguardi.

A seeker of truth leaves no stone unturned in his search. In a normal case normal methods of ascertaining truth are usually sufficient but in a complex case with troublesome issues the pursuit must be persistent and use more sophisticated equipment to aid in the search. The credibility of these witnesses has been the crucial issue in this litigation from its inception. Appellant's motion, bringing forth the third or fourth version of facts, only further confuses this issue. If Zaher is telling the truth, then justice demands appellant be granted a new trial. Since the District Court set forth standards which it believed would render a polygraph examination reliable under a stated set of circumstances the government's objection to such testimony should not have caused the court to deny appellant's application. The court has both the power and the obligation to uncover the truth in appellant's case once and for all. The government's concern for establishing a bad precedent can not be allowed to subvert that search. (376a).

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of conviction of the appellant in the court below should be vacated and a new trial ordered or in the alternative, the court should remand the case to the District Court with instructions to appoint a court expert to administer polygraph examinations to those participants in the trial consenting to undergo such a test.

Respectfully submitted,

Michael B. Pollack

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A 202 Affidavit of Personal Service of Papers
COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

- against -
JOHN FRANZESE,
Defendant- Appellant.

Index No.

Affidavit of Personal Service

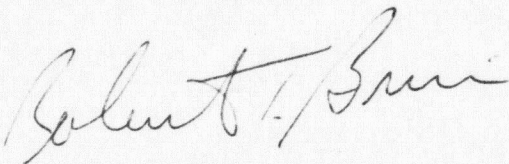
STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Reuben A. Shearer *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030

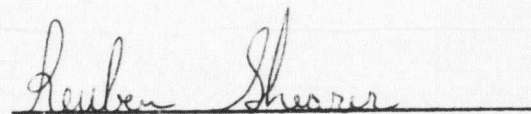
That on the 7th day of April 1976 at 225 Cadman Plaza, Brooklyn, New York
deponent served the annexed Appendix Brief upon

David Trager
the in this action by delivering 2 true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 7th
day of April 1976



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977


Reuben Shearer